No. 12-417

IN THE

Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,
Petitioners,
v.
UNITED STATES STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women.[1]

The United Food and Commercial Workers International Union (UFCW) is a labor organization of 1.3 million members representing workers across the United States in various industries, including meat packing, poultry processing, and other food processing.

This case involves § 3(o) of the Fair Labor Standards Act (FLSA), which "exclude[s] from measured working time" for purposes of the FLSA's minimum wage and overtime requirements "any time spent in changing clothes or washing at the beginning or end of each workday" if such time is excluded by a "bona fide collective bargaining agreement." 29 U.S.C. § 203(o). AFL-CIO-affiliated unions and the

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[1] Counsel for the petitioners and counsel for the respondent have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief.

UFCW regularly engage in collective bargaining over pay for clothes-changing and washing time and thus have a strong interest in the proper interpretation of § 3(o).

STATEMENT

Clifton Sandifer and several other employees of U.S. Steel Corporation filed a collective action complaint under the FLSA against U.S. Steel for failing to pay employees required minimum wages and overtime for time spent putting on and taking off various items in the company locker room at the beginning and end of each work day, as well as for several other violations of the FLSA. The items at issue include "flame-retardant jackets and pants [], safety glasses, a hard hat, protective footwear (steel-toed shoes with metatarsal guards), gloves, hearing protection, snoods, spats, leggings, and[] wristlets." *Sandifer v. U.S. Steel Corp.*, 2:07-CV-443, 2009 U.S. Dist. LEXIS 96715, *5 (N.D. Ind., Oct. 15, 2009).

U.S. Steel contended that it was not liable to the employees under the FLSA for the clothes-changing time because the listed items constitute "clothes" within the meaning of § 3(o) and the company had entered into a collective bargaining agreement with the employees' representative that made such clothes-changing time non-compensable. Sandifer argued, in contrast, that the items are not clothes, but safety equipment, and that § 3(o) therefore did not apply.

The court of appeals agreed with the company that the bulk of the items at issue constituted clothes within the meaning of § 3(o). *Sandifer v. U.S. Steel*

Corp., 678 F.3d 590, 594 (7th Cir. 2012). Although the court concluded that the safety glasses, ear plugs, and hard hat were not clothes, it found that the time it took for each employee to don and doff these items was *de minimus* and, for that reason, not compensable. *Id.* at 593. Ruling against the plaintiffs on all of their FLSA claims, the court of appeals dismissed the suit.

Petitioners filed a petition for a writ of certiorari, seeking review of several aspects of the court of appeals' decision. The Court granted the writ of certiorari limited to the following question: "What constitutes 'changing clothes' within the meaning of section 203(o)?"

SUMMARY OF ARGUMENT

Section 3(o) was added to the FLSA as part of a package of amendments in 1949. In enacting these amendments, the phrase "time spent in changing clothes" was added by a conference committee as a limitation to the original version of § 3(o) passed by the House of Representatives that would not have counted "*any* time" excluded by a collective bargaining agreement from "measured working time" for purposes of the FLSA's minimum wage and overtime provisions.

By so precisely limiting the scope of topics over which employers and unions can bargain different pay arrangements than required by the FLSA, Congress indicated that it had a specific understanding of the phrase "time spent in changing clothes." That understanding was based on the practice of bargaining for compensation for the otherwise personal activity of changing out of street clothes and into

clothing or uniforms which could not be worn outside the plant in industries such as baking and meat packing, bargaining that had been required by the National War Labor Board and that continued into the immediate post-war period when § 3(o) was enacted.

Importantly, the War Labor Board distinguished such clothes-changing from the donning and doffing of protective and safety equipment, which it considered to be on the same footing as the preparation of company-owned tools and equipment. Unlike changing clothes, which, except in unusual circumstances, was considered a purely personal and thus uncompensated activity, the Board considered the donning and doffing of protective and safety equipment to be an integral part of an employee's work that should be compensated on the same basis as other work.

Because the court of appeals utilized an incorrect understanding of the statutory phrase "time spent changing clothes," it incorrectly characterized several items of safety equipment as clothes. This Court should, therefore, reverse the court of appeals' decision and remand so that the court can apply the correct legal standard to the items at issue in this case.

ARGUMENT

Section 3(o) of the Fair Labor Standards Act provides that in calculating an employee's working time for purposes of the Act's minimum wage and maximum hours provisions, "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday" which is "excluded from measured working time" by "a bona fide col-

lective bargaining agreement." 29 U.S.C. § 203(o). The question presented by this case is what constitutes "time spent in changing clothes" for purposes of a collectively bargained exclusion from "measured working time."

Section 3(o) was added to the Fair Labor Standards Act in 1949. At that time, the phrase "changing clothes" had a well-established meaning under collectively bargained compensation schemes that had been mandated in several industries by the National War Labor Board. *See The Termination Report of the National War Labor Board*, vol. 1, pp. 387-88 (1947) ("Time Spent Changing Clothes"). *See also id.* at 1045-49 ("The Meat Packing Commission"). Under those compensation schemes, the phrase "changing clothes" – like the term "washing" – referred to a "purely personal activit[y]" "by which the individual gets himself ready for his daily tasks or for his return home after the day is ended." *Big Four Meat Packing Cos.*, 21 War Labor Rep. 652, 672 (1945).

Significantly for present purposes, the War Labor Board treated an employee's preparation of "safety and protective devices" as an activity distinct from "changing clothes." *Swift & Co.*, 21 War Labor Rep. 709, 711 (1945). The War Labor Board was reluctant to order compensation for time spent in "changing clothes," except where the employees were required "to wear special clothing or uniforms which must be kept clean and which may not be worn outside the plant," conditions that were common in industries, such as baking and meat packing, "involving the preparation and handling of food products." *Labor-*

Management Contract Provisions 1953, Bureau of Labor Statistics Bulletin No. 1166, p. 14 (1954). In the War Labor Board's view, "[t]he time spent in preparing tools and working equipment st[ood] on a separate footing," because "[t]his is an activity which is an integral part of a man's work." *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672. And, the Board made clear that for purposes of determining compensated time, the category of "tools, includes . . . metal guards, and other protective and safety equipment." *Id.* at 673.

By excluding from FLSA working time "any time spent in changing clothes or washing" that is "excluded from measured working time" by "a bona fide collective bargaining agreement," 29 U.S.C. § 203(o), Congress intended to preserve the sort of compensation schemes established by the decisions of the War Labor Board. Under those schemes, "changing clothes" is the act of changing out of "ordinary street clothes," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 671, and into apparel of a type that "may be worn only when at work," *Continental Baking Co.*, 18 War Labor Rep. 470, 471 (1944). "Changing clothes" does not, by contrast, include the activity of donning "protective and safety equipment." *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 673.

1. Section 3(o) was enacted as part of the Fair Labor Standards Amendments of 1949, Pub. L. No. 81-393 § 3(d), 63 Stat. 910, 911 (1949). In signing the 1949 legislation into law, President Truman explained that "this amendatory act will . . . [e]ncourage the development of plans for employment on an annual basis through collective bargaining by providing

greater flexibility in the overtime provisions. These plans assure stability of income for wage earners and stability of operation for employers." Harry S. Truman, Statement by the President Upon Signing the Fair Labor Standards Amendments, Oct. 26, 1949. In keeping with this statutory purpose, the amendments provided for a number of collectively bargained exceptions to the requirements of the FLSA. *See* Pub. L. 81-393 §§ 7(b), 7(d)(7), & 7(e), 63 Stat. at 913-14 (codified as amended at 29 U.S.C. §§ 207(b), 207(e)(7) & 207(f)).

As introduced, the 1949 amendments did not contain the § 3(o) exclusion. *See generally* H.R. Conf. Rep. No. 81-1453 (Oct. 17, 1949), *reprinted in* 1949 U.S.C.C.A.N. 2251. Section 3(o) originated in a floor amendment offered by Representative Christian Herter of Massachusetts that would have excluded for FLSA purposes "*any time* which was excluded from measured working time" by "a bona fide collective bargaining agreement." 95 Cong. Rec. 11,210 (1949) (emphasis added). The House adopted this amendment with very little debate, but only a much more limited version of the collective bargaining exclusion was accepted in conference. As the conference report explained, § 3(o) as enacted "limits this exclusion to time spent by the employee in changing clothes and cleaning his person at the beginning or at the end of each workday." H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2255.

Representative Herter explained that the purpose of his floor amendment was to give effect to "the determinations of what constitutes hours of work

which have been spelled out in many collective-bargaining agreements." 95 Cong. Rec. 11,210. He cited, in particular, the example of "the bakery industry" in which the question of whether "the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day . . . has been carefully threshed out" in the "collective bargaining agreements." *Ibid.*

The baking industry was the first place where the War Labor Board directed a collectively bargained resolution of the issue of compensation for time spent changing clothes. In *Continental Baking Co.*, 18 War Labor Rep. at 471-72, the Board determined that, where "[a]s an incident of their employment, [employees] are required to wear clothing made of a washable material which must be kept clean at all time and which may be worn only when they are at work," "payment should be made by the company for this branch of the employees' activity." The Board then reached the same conclusion with respect to required workplace clothes-changing in the meat packing industry. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 655.

Recognizing that "administrative difficulties preclude an exact measurement of the time reasonably consumed by each individual employee in putting on and removing his uniform," the Board directed that any compensation for changing clothes be based on "a fair estimate of time spent in this task." *Continental Baking Co.*, 18 War Labor Rep. at 472. In *Continental Baking*, the Board made such an estimate itself, *ibid.*, but in the meat packing cases, it "referred back to the parties for collective bargain-

ing" the determination of a "reasonable allowance for such time," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 655. The resulting collective bargaining agreements provided a specified amount of compensated time to cover clothes-changing rather than including clothes-changing time as part of the other measured working time. *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, p. 21 (1952). In the meat packing agreements, for example, the allotted paid-time for clothes changing was 12 minutes. *Ibid.*

Because the provisions regarding compensation for time spent changing clothes in the baking and meat packing collective bargaining agreements constituted "an equitable compromise on this troublesome issue," these industries were "spared the portal-to-portal pay suits which were filed in so many other industries in 1946." EDWIN E. WITTE, *Industrial Relations in Meat Packing*, *in* LABOR IN POSTWAR AMERICA 500 (Colston E. Warne ed., 1949). However, employers in the baking industry became concerned that their collectively-bargained resolution of the clothes-changing issue would be up-ended by the Department of Labor's regulations interpreting the Portal-to-Portal Act of 1947. *See A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938, and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong., 1st Sess. 1565-69 (1949) (statement of William A. Quinlan, General Counsel, Associated Retail Bakers of America).

The Portal-to-Portal Act of 1947 addressed the problems created by the 1946 wave of portal-to-por-

tal pay suits by immunizing employers from FLSA liability for their failure to pay employees for time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" as well as for "activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. § 254(a). However, the Department of Labor's regulations interpreting the Act stated that time spent "changing clothes on the employer's premises at the beginning and end of the workday" did not necessarily constitute preliminary and postliminary activity, but rather would be covered by the FLSA's minimum wage and maximum hours provisions in cases where the employee "cannot perform his principal activities without putting on certain clothes." U.S. Dept. of Labor, General Statement as to the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, 12 Fed. Reg. 7655, 7660 (Nov. 18, 1947) (codified at 29 C.F.R. § 790.8(c)). This aspect of the regulations seemed directed at precisely the same type of clothes-changing that the War Labor Board had referred to collective bargaining for resolution.

Representatives of various baking industry groups testified before the House and Senate labor committees advocating adoption of the amendment eventually introduced by Representative Herter. The baking industry witnesses testified that without an amendment to the FLSA, "[m]anagement and labor . . . would be prevented from settling by collective bargaining the question of what is properly to be included in measured working time, and established con-

tracts still would be rendered ineffective in this respect." *A Bill to Provide For the Amendment of the Fair Labor Standards Act of 1938, and For Other Purposes: Hearings on H.R. 2033 Before the House Comm. on Educ. and Labor*, 81st Cong., 1st Sess. 1568 (1949) (statement of William A. Quinlan, General Counsel, Associated Retail Bakers of America). "The result of this situation is that if an employer and a union agree upon rates of pay and overtime provisions with an express understanding that certain activities are to be excluded from measured working time, . . . neither party can be certain that such activities will not nevertheless be treated as 'work' for purposes of the Fair Labor Standards Act." *Bills Relative to Federal Labor Standards Act Amendments: Hearings on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248 and S. 653 Before a Subcomm. of the S. Comm. on Labor and Pub. Welfare*, 81st Cong., 1st Sess. 816 (1949) (memorandum submitted by Joseph Creed, Counsel, Pennsylvania Bakers Association on S. 653).

As we have noted, in enacting § 3(o), Congress declined to adopt the broad collective bargaining exception advocated by the baking industry and proposed by Representative Herter. Instead, Congress "limit[ed] this exclusion to time spent by the employee in changing clothes and cleaning his person." H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2251. In other words, § 3(o) was limited to precisely the sort of collectively bargained "exclu[sions] from measured working time," 29 U.S.C. § 203(o), that had been directed by the War Labor Board in the baking and meat packing industries.

2. The decisions of the War Labor Board give "separate treatment" to the issue of "compensation for time spent in changing clothes on the one hand" and compensation for time spent "in preparing tools on the other." *Swift & Co.*, 21 War Labor Rep. at 718. The Board determined that where time had to be spent changing clothes at the workplace, "it is fair and equitable for the company to make reasonable allowances for such time" and "referred [the matter] back to the parties for collective bargaining." *Id.* at 710. By contrast, the Board treated time spent in the preparation of "safety and protective devices" as similar to time spent preparing other necessary tools and "directed that the present practice of the company of paying for the preparation . . . of large company owned tools shall be extended to cover the preparation . . . of all tools," including the safety devices. *Id.* at 710-11. Under these arrangements, time spent changing clothes was "excluded from measured working time," 29 U.S.C. § 203(o), and was compensated instead based on a reasonable estimate of the necessary time, while time spent in preparing tools, including safety equipment, was compensated like other working time.

The different treatment of compensation for clothes-changing time and for time spent in preparing tools and safety equipment was due to the essentially different character of the two types of activity. Except in extraordinary circumstances, the Board considered "the time spent in dressing and undressing" to be "purely personal activities" "by which the individual gets himself ready for his daily tasks or for his return home after the day is ended" and for which compensation was appropriate only in extraordinary

circumstances. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672. In the Board's view, however, "[t]he time spent in preparing tools and working equipment st[ood] on a separate footing" from clothes changing, because "[t]his is an activity which is an integral part of a man's work." *Ibid.* It was generally accepted that "[t]ime spent in such effort may properly be regarded as a proper charge against the business." *Ibid.* Thus, the Board directed that "[t]he present practice of paying for the preparation of company owned tools should be extended to cover the preparation of small tools, which hitherto has been done on the worker's own time." *Ibid.*

War Labor Board decisions from the meat-packing industry draw a sharp distinction between changing clothes and preparing safety devices worn by the employee. The Board made clear that with regard to compensation for time spent preparing tools, the category of "tools includes . . . metal guards, and other protective and safety equipment." *Id.* at 673. *See also Swift & Co.*, 21 War Labor Rep. at 710-11 ("direct[ing] that the present practice of the company of paying for the preparation and repair of large company owned tools shall be extended to cover the preparation and repair of all tools and working equipment which the company is in this order directed to furnish to the employees," including among such "tools and working equipment" "all safety and protective devices"); *John Morrell & Co.*, 21 War Labor Rep. 730, 733 (Feb. 20, 1945) (same). Among the items commonly included in the category of "safety equipment" under the meat packing collective bargaining agreements were "mesh gloves, wrist guards, knife guards, leather aprons, hook

pouches, knife pouches, knife boxes, needle pouches, helmets and goggles." *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23.

By rejecting the version of § 3(o) that would have excluded from the FLSA calculation "any time which was excluded from measured working time" by "a bona fide collective bargaining agreement," 95 Cong. Rec. at 11,210, and instead "limit[ing] this exclusion to time spent by the employee in changing clothes and cleaning his person," H.R. Conf. Rep. No. 81-1453, *reprinted in* 1949 U.S.C.C.A.N. at 2255, Congress clearly intended to cover precisely the sort of "exclu[sions] from measured working time" mandated by the War Labor Board. Under the War Labor Board decisions, only the "purely personal activit[y]" of changing from "ordinary street clothes" was excluded from measured working time. *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 671-72. By contrast, the preparation of "all safety and protective devices," *Swift & Co.*, 21 War Labor Rep. at 711, including the donning of "mesh gloves, wrist guards, knife guards, leather aprons, . . . helmets and goggles," *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23, was treated as "an integral part of a man's work," the same as any other "preparation of small tools," and was not to be "done on the worker's own time," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672.

The phrase "time spent in changing clothes" thus refers to the same clothes-changing considered by the War Labor Board – the "purely personal activit[y]" of changing from "ordinary street clothes" to

work clothes, *id.* at 671-72, but not the donning of safety equipment.

3. The court of appeals in this case proceeded on the understanding that the phrase "changing clothes" in § 3(o) encompasses "clothing in the ordinary sense." *Sandifer*, 678 F.3d at 593. The court did not attempt to explain what it meant by "clothing in the ordinary sense," except to state that the term must include "work clothes," since § 3(o) governs compensation for work. *Id.* at 594. The court did, however, hold that "clothing in the ordinary sense" could encompass "safety equipment." *Ibid.* As the foregoing discussion has demonstrated, the phrase "changing clothes" in § 3(o) clearly does not encompass preparing "safety equipment."

Despite its erroneous understanding of the statutory phrase "changing clothes," the court below did correctly determine that "glasses and ear plugs are not clothing" and suggested that a "hard hat," might be or might not be clothing. *Id.* at 593. However, because the court incorrectly treated safety equipment as a type of clothing, it incorrectly determined that "work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), . . . and a 'snood' (a hood that covers the top of the head, the chin, and the neck)" were clothes within the meaning of § 3(o). *Id.* at 592-94. And, the court of appeals took no account at all of a number of additional items of safety equipment that employees were required to don at work, such as "spats," "leggings," and "wristlets." *Sandifer*, 2:07-CV-443, 2009 U.S. Dist. LEXIS 96715, at *5.

None of these items would have been considered "clothes" for purposes of collectively bargained "exclu[sions] from measured time" in 1949. Rather, as we have shown, "protective and safety equipment," *Big Four Meat Packing Cos.*, 21 War Labor Rep. at 672 – including "mesh gloves, wrist guards, knife guards, leather aprons, ... helmets and goggles," *Collective Bargaining in the Meat-Packing Industry*, Bureau of Labor Statistics Bulletin No. 1063, pp. 22-23 – was treated as tools. Therefore, contrary to the determination of the court below, the donning of such safety equipment does not constitute "changing clothes" within the meaning of FLSA § 3(o).

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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